No. 17-965

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The MacArthur Justice Center ("MJC") is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC has represented clients facing myriad human rights and civil rights injustices, including issues of discrimination, the unlawful detention of foreign nationals, and the rights of marginalized groups in the American justice system. MJC has an interest in the rule of law and the independence of the judiciary in determining whether government officials have acted with discriminatory animus against an unpopular minority group.

MJC submits this brief to document the President's extensive and explicit record of hatred against people of the Muslim faith, his open desire to curtail their rights, and his specific, sustained promise to inhibit their entry to the U.S. MJC's prior briefing was relied upon by the district court in this case, in enjoining the President's second Executive Order, *see Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1137 n.14 (D. Haw. 2017), and by parties in the various proceedings challenging the President's orders.[1]

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[1] All parties have consented to the filing of this brief. Petitioners' blanket consent has been noted on the Court's docket and Respondents have provided written consent. No party, party's counsel, or person other than MJC authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This President of the United States selected an unpopular minority faith that makes up 1% of the nation's population, ran a campaign that vilified and pledged to assail that minority faith, and has, since taking office, been persistent in delivering on one of his most repeated promises: To prevent people of that faith from entering the country. The MacArthur Justice Center ("MJC") submits this brief to ensure that when this Court resolves this case, it does so with full awareness of the extensive record of animus toward people of the Muslim faith that led up to the present Proclamation. MJC cautions that the government's argument to this Court presses for judicial abdication that would be matched only by cases like *Korematsu v. United States*, 323 U.S. 214 (1944), and *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

In its brief to this Court, the government suggests that discerning the President's discriminatory motive in this case requires "judicial psychoanalysis" and a "probing of the Chief Executive's supposed subjective views." Gov't Br. at 67. Those representations are divorced from fact. The historical record shows that the President engaged in an open, sustained, and targeted attack on people of the Muslim faith, labeling the religion as a "problem" and affirmatively disseminating anti-Muslim propaganda. He repeatedly expressed his intention to curtail the rights of persons who practice Islam, saying that, given the opportunity, he would shut down mosques, surveille and profile Muslims, and create a registry of all Muslims.

The record shows that the President not only made a specific pledge to restrict the entry of Muslim people,

but that he laid out his plan to do so with remarkable specificity. After openly expressing his intent to exclude Muslims from the country, Mr. Trump telegraphed that he would achieve his object under the guise of a neutral order—by speaking in terms of "territories" and "extreme vetting" instead of "Muslims"—just as he later did in his orders. He also previewed that he would get away with it by asserting the President's broad immigration authority under 8 U.S.C. § 1182(f), the same provision he later invoked in his orders and that the government invokes before this Court. *See* Gov't Br. Part II.A. When asked to defend his intent, Mr. Trump expressly invoked the internment of Japanese Americans during World War II as proof that he would succeed in singling out Muslims. If this record does not qualify as "the clearest affirmative showing" of discriminatory motivation, Gov't Br. at 63, none could.

The government focuses on whether the President's latest Proclamation has overcome the "taint" of his longstanding pledge to discriminate against and restrict the entry of Muslim people. Gov't Br. at 65-66, 69. But that question is academic here. The President has never once attempted to retract his pledge since taking office and has, to the contrary, reaffirmed it. In the immediate lead up to the present Proclamation, for instance, the President expressly stated that he would prefer an order that "go[es] all the way" and does "what [he] wanted to do in the first place." He also chided the Department of Justice for making the language in his earlier orders "politically correct"—a criticism whose *only plausible interpretation* is that the President views the territories at issue as a proxy for religion. And upon issuing the present Proclamation, his Administration again betrayed its religious

purpose: When asked whether "the President think[s] that Muslims are a threat to the United States," the President's spokesperson explained, "the President has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."

Even setting aside the President's own express resort to the internment of Japanese Americans, the government's call for this Court to step aside upon the President's bare mention of the words "national security," is chillingly reminiscent of the closing paragraph of *Korematsu* itself:

> To cast this case into outlines of [religious] prejudice, without reference to the real military dangers which were presented, merely confuses the issue. [Muslims were] not excluded from the [United States] because of hostility to [them] or [their religion]. [They were] excluded because we are at war with [radical Islamic terrorism], because the [President] feared an invasion of our [country] and felt constrained to take proper security measures, because [he] decided that the military urgency of the situation demanded that [certain persons of Muslim religion] be segregated from the [United States] temporarily, and, finally, because [the President] . . . determined that [he] should have the power to do just this.

Korematsu, 323 U.S. at 223 (with modification in brackets).

MJC urges the Court not to repeat that depraved moment in U.S. history.

ARGUMENT

I. The President's Express Hatred, Dissemination Of Propaganda, And Pledges To Use His Official Power Against Muslims.

The President's Proclamation followed repeated and unabashed admissions of an intent to discriminate against people who choose to practice Islam. This Section documents the President's hateful statements against Muslim people, his affirmative dissemination of propaganda vilifying them, his express desire to oppress them, and his specific and sustained pledge to restrict their entry into the country.

A. The President's Statements That Muslims Are A "Problem" And His Spreading Of Vilifying Propaganda.

1. Advocating That Muslims Are A "Problem."

President Trump has long advocated that the U.S. has a "Muslim problem," that Islam is a religion of "tremendous hatred," and that there is no meaningful distinction between being Muslim and being a terrorist. As early as April 2011, he recounted that he had been asked "is there a Muslim problem?" and he responded:

> [A]bsolutely, yes. . . . I mean I could have said, "Oh absolutely not . . . there's no Muslim problem, everything is wonderful, just forget about the World Trade Center." But you have to speak the truth. . . . The Koran is very interesting. . . . there's something there that teaches some very negative

> vibe. . . . there's tremendous hatred out there that I've never seen anything like it.[2]

The President has frequently repeated these views. At an event on September 18, 2015, Mr. Trump agreed with an audience member's comment that "We have a problem in this country. It's called Muslims."[3] On December 10, 2015, Mr. Trump tweeted three separate statements referring to a "massive Muslim problem," praising an author for acknowledging "Muslim problems," and associating Muslims with terrorism.[4]

Several times throughout 2015 and 2016, Mr. Trump declined to accept that a distinction could be drawn between radical Islam and Islam itself. On February 4, 2016, Mr. Trump was asked to clarify: "Is it really a Muslim problem, or is it a radical Islamist problem?" He responded: "Maybe it's a Muslim

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[2] David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a 'Very Negative Vibe,'* CBN News (Apr. 12, 2011), http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches (last visited Mar. 20, 2018).

[3] Theodore Schleifer, *Trump doesn't challenge anti-Muslim questioner at event*, CNN (Sept. 18, 2015), http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/ (last visited Mar. 20, 2018).

[4] Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/674934005725331456 (last visited Mar. 20, 2018); Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/674936832010887168 (last visited Mar. 20, 2018); Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/675123192864899072 (last visited Mar. 20, 2018).

problem, maybe it's not."[5] In March of 2016, he elaborated, "I think Islam hates us" and that Muslims have "tremendous hatred" and "unbelievable hatred."[6] He expressly rejected that a distinction could be drawn between radical Islam and Islam itself, claiming "[i]t's very hard to define."[7] The following day, Mr. Trump was asked whether his statement "Islam hates us" referred to all 1.6 billion Muslims in the world, and he responded: "I mean a lot of them. I mean a lot of them."[8] He further stated: "There's something going on that maybe you don't know about, maybe a lot of other people don't know about, but there's tremendous hatred. And I will stick with exactly what I said [the previous day]."[9]

2. Spreading Anti-Muslim Propaganda.

The President has gone further than expressions of hatred for Islam. He has affirmatively disseminated propaganda that vilifies people of the Muslim faith. On November 21, 2015, for instance, Mr. Trump falsely proclaimed: "I watched when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of

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[5] CNN Interview of Donald Trump, YouTube (Feb. 4, 2016), https://www.youtube.com/watch?v=uW9UlMqJtro (minutes 18:42 to 18:46) (last visited Mar. 20, 2018).

[6] Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/ (last visited Mar. 20, 2018).

[7] *Id.*

[8] *Transcript of Republican Debate in Miami*, CNN (Mar. 15, 2016), http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text/ (last visited Mar. 20, 2018).

[9] *Id.*

people were cheering as that building was coming down. Thousands of people were cheering."[10]

In the face of the authorities and articles debunking his claim,[11] Mr. Trump continued to spread this lie:

- On November 22, 2015, he stated: "There were people that were cheering on the other side of New Jersey, where you have large Arab populations. They were cheering as the World Trade Center came down. . . . there were people cheering as that building came down—as those buildings came down. And that tells you something."[12]
- On November 23, 2015, he again stated: "I saw people getting together and, in fairly large numbers, celebrating as the World Trade Center was coming down, killing thousands of people–thousands and thousands of people... People are still dying over what happened with

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[10] Glenn Kessler, *Trump's outrageous claim that 'thousands' of New Jersey Muslims celebrated the 9/11 attacks*, Wash. Post (Nov. 22, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/ (last visited Mar. 20, 2018).

[11] *See, e.g.*, Lauren Carroll, *Fact Checking Trump's claim that thousands in New Jersey cheered when World Trade Center tumbled*, Politifact (Nov. 22, 2015), http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donaldtrump/fact-checking-trumps-claim-thousands-new-jersey-ch/ (last visited Mar. 20, 2018).

[12] *See* Kessler, *supra* note 10.

the World Trade Center. And they're dying a terrible death. And I saw people."[13]

- On November 25, 2015, Mr. Trump tweeted: "Credible Source on 9-11 Muslim Celebrations: FBI" and linked to an article stating that a retired FBI agent referred to Mr. Trump's claims as "plausible."[14] He repeated this tweet on December 7, 2015.[15]
- On December 2, 2015, Mr. Trump shared another individual's tweet claiming to have seen "militant Muslims burning our flag and burning George Bush photos and figures, right after 9/11!"[16]

The President has also repeatedly spread a false story involving the mass murder of Muslims using

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[13] AP Archive, Trump Defends 9/11 Celebrations with Article (Nov. 24, 2015), http://www.aparchive.com/metadata/US-OH-Trump-CR-/cadcfee1334d2a1fea065ba383ef6f8e (last visited Mar. 20, 2018); Jenna Johnson, *Donald Trump on waterboarding: "If it doesn't work, they deserve it anyway,'* Wash. Post (Nov. 23, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/ (last visited Mar. 20, 2018).

[14] Donald J. Trump, Twitter (Nov. 25, 2015), https://twitter.com/realDonaldTrump/status/669682774673137665 (last visited Mar. 20, 2018); *see also* Bill Riales, *Credible Source on 9-11 Muslim Celebrations: FBI*, WKRG (Nov 25, 2015), http://wkrg.com/2015/11/25/credible-source-on-9-11-muslim-celebrations-fbi/ (last visited Mar. 20, 2018).

[15] Donald J. Trump, Twitter (Dec 7, 2015), https://twitter.com/realDonaldTrump/status/673905762087936000 (last visited Mar. 20, 2018); *see also* Riales, *supra* note 14.

[16] Donald J. Trump, Twitter (Dec 2, 2015), https://twitter.com/realDonaldTrump/status/672182509111767041 (last visited Mar. 20, 2018).

pigs' blood. On February 19, 2016, treating the word "terrorist" as a synonym for "Muslim," he approvingly recounted the following story:

> Early in the century, last century . . . they had a terrorism problem. And there's a whole thing with swine and animals and pigs and you know the story, they don't like that. . . . General Pershing was a rough guy . . . he took the 50 terrorists, and he took 50 men and he dipped 50 bullets in pigs' blood . . . And he had his men load his rifles, and he lined up the 50 people, and they shot 49 of those people. . . . And for 25 years, there wasn't a problem.[17]

President Trump repeated this anti-Muslim propaganda, adding new flourish. On March 11, 2016, for instance, again equating being a terrorist with being a Muslim, he recounted:

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[17] C-Span, Donald Trump Campaign Rally in Charleston, South Carolina (Feb. 19, 2016), https://www.c-span.org/video/?404947-1/donald-trump-campaign-rally-charleston-south-carolina (minutes 34:09 to 35:31) (last visited Mar. 20, 2018); Louis Jacobson, *Donald Trump cites dubious legend about Gen. Pershing, pig's blood and Muslims*, Politifact (Feb. 23, 2016), http://www.politifact.com/truth-o-meter/statements/2016/feb/23/donald-trump/donald-trump-cites-dubious-legend-about-gen-pershi/ (last visited Mar. 20, 2018); Jenna Johnson and Jose A. DelReal, *Trump tells story about killing terrorists with bullets dipped in pigs' blood, though there's no proof of it*, Wash. Post (Feb. 20, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/20/trumps-story-about-killing-terrorists-with-bullets-dipped-in-pigs-blood-is-likely-not-true/ (last visited Mar. 20, 2018); *see also* David Mikkelson, *Pershing the Thought*, Snopes (Apr. 28, 2016), http://www.snopes.com/rumors/pershing.asp (debunking Mr. Trump's story about General Pershing) (last visited Mar. 20, 2018).

> So General Pershing, . . . they catch 50 terrorists in the Philippines . . . And as you know, swine, pig, . . . a big problem for them, big problem. He took two pigs, they chopped them open. Took the bullets that were going to go and shoot these men. Took the bullets, the 50 bullets, dropped them in the pigs, swished them around, so there was blood all over those bullets . . . They put the bullets into the rifles. And they shot 49 men . . . I'm just saying, if we're going to win, we're going to win or let's not play the game and let's not be a country any more. They put the bullets in the rifles and they shot 49 of the 50 men. Dead. Boom. So it was a pig-infested bullet in each one. . . . For 28 years, there was no terrorism. . . . We have to do what we have to do. We have to clean it out.[18]

As discussed in Section I.D, the President has continued to repeat this particular propaganda since taking office, including in the immediate lead up to the present Proclamation.[19]

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[18] *FULL Speech: Donald Trump rally in Dayton, OH 3-12-2016*, YouTube (Mar. 12, 2016), https://www.youtube.com/watch?v=-9KOAHf4GCw (minutes 42:45 to 46:45) (last visited Mar. 20, 2018); Mark Z. Barabak, *All in a day's Trump rally: sneering, sarcasm, protests*, Los Angeles Times (Mar. 12, 2016), http://www.latimes.com/nation/politics/la-na-trump-rallies-20160312-story.html (last visited Mar. 20, 2018); *see also* Lydia Wheeler, *Trump resurrects story of Muslims shot with pig's blood-dipped bullets*, The Hill (Mar. 12, 2016), http://thehill.com/blogs/blog-briefing-room/news-campaigns/272780-trump-resurrects-story-of-muslims-shot-with-pigs (last visited Mar. 20, 2018).

[19] Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088 (encouraging

B. The President's Express Desire To Close Down And Surveille Mosques, Profile Muslims, And Create A Muslim Registry.

1. Closing And Surveilling Mosques.

The President has, on numerous occasions, openly stated his preference for shutting down or surveilling mosques in America. On November 16, 2015, referring to the prospect of shutting down mosques, he said: "[I]t's something that you're going to have to strongly consider because some of the ideas and some of the hatred—the absolute hatred—is coming from these areas."[20] Two days later, when asked whether he would actually shut down mosques, Mr. Trump responded that there was "absolutely no choice" but to do so: "A lot of people understand it. We're going to have no choice. There's absolutely no choice."[21]

The President has called for shutting down mosques or the suspicionless surveillance of mosques on numerous other occasions:

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people to "[s]tudy what General Pershing of the United States did to terrorists when caught.") (last visited Mar. 20, 2018).

[20] Jenna Johnson, *Donald Trump would 'strongly consider' closing some mosques in the United States*, Wash. Post (Nov. 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/ (last visited Mar. 20, 2018).

[21] Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015), http://www.politico.com/story/2015/11/trump-close-mosques-216008 (last visited Mar. 20, 2018); *Trump says US will 'have no choice' but to shut some mosques down*, Fox News (Nov. 18, 2015), http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-mosques-down.html (last visited Mar. 20, 2018).

- On October 21, 2015, Mr. Trump stated that he was "going to have to certainly look at" closing mosques in the United States.[22]
- On November 16, 2015, Mr. Trump said: "You're going to have to watch and study the mosques, because a lot of talk is going on at the mosques."[23]
- On November 19, 2015, Mr. Trump was asked whether his push for increased surveillance of American Muslims could include warrantless searches. He stated that he would consider a series of drastic measures against Muslims: "We're going to have to do things that we never did before. . . . And certain things will be done that we never thought would happen in this country in terms of information and learning about the enemy. And so we're going to have to do certain things that were frankly unthinkable a year ago."[24]

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[22] Sarah Pulliam Bailey, *Donald Trump says he would consider closing down some mosques in the U.S.*, Wash. Post (Oct. 21, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/ (last visited Mar. 20, 2018).

[23] Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/ (last visited Mar. 20, 2018).

[24] Hunter Walker, *Donald Trump has big plans for 'radical Islamic' terrorists, 2016 and 'that communist' Bernie Sanders*, Yahoo News (Nov. 19, 2015), https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html (last visited Mar. 20, 2018).

- On November 21, 2015, Mr. Trump stated: "[J]ust to say it clear—I want surveillance of these people. I want surveillance if we have to, and I don't care. . . . I want surveillance of certain mosques."[25]
- On December 7, 2015, Mr. Trump called for the surveillance of mosques, again equating the Muslim religion with hatred and terror: "Yes, we have to look at mosques. . . . We have no choice. We have to see what's out there, because something is happening in there."[26]
- On June 13, 2016, Mr. Trump stated: "We have to be very strong in terms of looking at the mosques, you know, which a lot of people say, 'Oh, we don't want to do that. We don't want to do that.' We're beyond that."[27]
- On June 15, 2016, Mr. Trump stated: "We have to go and we have to maybe check, respectfully, the mosques."[28]

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[25] Lauren Carroll, *In Context: Donald Trump's comments on a database of American Muslims*, Politifact (Nov. 24, 2015), http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/ (last visited Mar. 20, 2018).

[26] Transcript, *Trump Calls for Ban on Muslims Entering the U.S.*, CNN (Dec 8, 2015), http://www.cnn.com/TRANSCRIPTS/1512/08/es.02.html (last visited Mar. 20, 2018).

[27] *See* Jacobson, *supra* note 23.

[28] Jeremy Diamond, *Trump doubles down on calls for mosque surveillance*, CNN (Jun. 15, 2016), http://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/ (last visited Mar. 20, 2018).

- On June 19, 2016, when asked what it means to "respectfully check a mosque," Mr. Trump clarified that he meant the suspicionless surveillance and shutdown of mosques: "Well, you do as they used to do in New York, prior to this mayor dismantling. By the way, if you go to France right now, . . . they are closing down mosques. . . . They are actually closing down mosques."[29]

2. Registering American Muslims.

Mr. Trump also repeatedly advocated for registering all Americans who choose to practice the Muslim faith. When confronted with comparisons to the Nazis' registration of Jewish people, Mr. Trump expressed no concern and continued advocating for a Muslim registry.

On November 19, 2015, Mr. Trump was asked whether he would require Muslims to register or carry a special form of identification that noted their religion, and he responded: "We're going to have to look at a lot of things very closely. We're going to have to look at the mosques. We're going to have to look very, very carefully."[30] The following day, when asked pointedly whether he was in favor of implementing a database tracking Muslims, he responded, "Oh I would certainly implement that. Absolutely."[31] When

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[29] *Face the Nation transcripts June 19, 2016: Trump, Lunch, LaPierre, Feinstein*, CBS News (Jun. 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/ (last visited Mar. 20, 2018); *see also* Jacobson, *supra* note 23.

[30] *See* Walker, *supra* note 24.

[31] Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News

asked whether Muslims would be legally obligated to sign into the database, Mr. Trump responded, "They have to be—they have to be."[32] Asked further how registering Muslims would be different from the Nazis' registration of Jewish people, Mr. Trump responded, "You tell me."[33]

The President echoed his preference for a registry of American Muslims on several other occasions:

- On November 21, 2015, Mr. Trump reaffirmed his desire to have a database of all Muslims: "So the database—I said yeah, that's alright fine . . . but database is okay, and watch list is okay, and surveillance is okay. If you don't mind, I want to be—I want to surveil."[34]
- The following day, Mr. Trump was asked: "You did stir up a controversy with those comments over the database. Let's try to clear that up. Are you unequivocally now ruling out a database on all Muslims?" He responded, "No not at all."[35]
- The day following that, Mr. Trump stated: "We have to really be vigilant with respect

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(Nov. 20, 2015), http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716 (last visited Mar. 20, 2018).

[32] *Id.*

[33] *Id.*

[34] ABC 33/40, Donald Trump in Birmingham: Full speech at the BJCC (Nov. 21, 2015), https://www.youtube.com/watch?v=IgvPoFo1zPY (minutes 43:11 to 43:32) (last visited Mar. 20, 2018).

[35] *See* Carroll, *supra* note 25.

> to the Muslim population . . . we have to surveil; we have to create lists; we have the refugees coming in and we have to create lists."[36]

3. Profiling Muslims.

On June 19, 2016, Mr. Trump stated that it was "common sense" to profile Muslims.[37] He later went further, stating on September 19, 2016, that there is "no choice" but to profile Muslim people.[38]

C. The President's Specific Pledge To Restrict The Entry of Muslims Under the Guise of A Neutral Order.

Mr. Trump repeatedly promised that he would prevent Muslims from entering the U.S. and that he would achieve this result by speaking in terms of "territories" and "extreme vetting" instead of using the word "Muslim." He also previewed that, upon doing so, he would invoke the same immigration powers that the government relies upon today and he justified his position with express reference to the

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[36] *Donald Trump in Ohio: U.S. has become 'soft, weak,'* Dayton Daily News (Nov. 23, 2015), http://www.daytondailynews.com/news/national-govt--politics/donald-trump-ohio-has-become-soft-weak/5ZOBQutE4XSjTxV2NjvFnJ/ (last visited Mar. 20, 2018).

[37] *Face the Nation transcripts June 19, 2016: Trump, Lynch, LaPierre, Feinstein*, CBS News (June 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/ (last visited Mar. 20, 2018).

[38] Aaron Blake, *Donald Trump doesn't call his position racial profiling. It is.*, Wash. Post (Sept. 20, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/20/donald-trump-doesnt-call-his-position-racial-profiling-it-is/ (last visited Mar. 20, 2018).

internment of Japanese Americans during World War II.

On December 7, 2015, Mr. Trump announced on his website: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States."[39] The same day Mr. Trump issued this announcement, he tweeted it with the title "Statement on Preventing Muslim Immigration."[40] Further equating Muslims with hatred and terror, he tweeted, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!"[41] Again on that same day, Mr. Trump verbally called for "a total and complete shutdown of Muslims," and added: "We have no choice. We have no choice. We have no choice."[42] He also appeared on national television to advocate his ban on Muslims.[43]

The following day, Mr. Trump was asked whether such a "broad approach against all Muslims" would be

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[39] Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (Internet Archive record on May 8, 2017) (last visited Mar. 20, 2018).

[40] Donald J. Trump, Twitter (Dec. 7, 2015), https://twitter.com/realDonaldTrump/status/673993417429524480 (last visited Mar. 20, 2018).

[41] Jenna Johnson, *Trump calls for 'total and complete shutdown of Muslims entering the United States,'* Wash. Post (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/ (last visited Mar. 20, 2018).

[42] *Id.*

[43] *Id.*

counterproductive, in contrast to targeting people the government had reason to investigate. Mr. Trump confirmed that he would not distinguish between Muslims and people suspected of wrongdoing, citing President Franklin D. Roosevelt's World War II Proclamations authorizing the detention and internment of Japanese, German, and Italian persons: "[L]ook at Franklin Roosevelt . . . Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it."[44]

When asked how border officials might implement his plan, Mr. Trump explained: "They would say, 'are you Muslim?'" The commentator further questioned: "And if they said yes, they would not be allowed in the country?" Mr. Trump responded, "That's correct."[45]

That same day, when asked whether he was given "any pause at all" by being compared to Hitler, Mr. Trump again justified banning Muslims based on President Roosevelt's internment of Japanese Americans, stating: "No because what I'm doing is no different than what F.D.R.—F.D.R.'s solution for Germans, Italians, Japanese, many years ago."[46]

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[44] *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015), https://www.youtube.com/watch?v=5I3E3-U-1jc (minutes 00:46 to 01:03) (last visited Mar. 20, 2018).

[45] *Id.* (minutes 14:58 to 15:14); *Hardball with Chris Matthews Transcript 12/8/15*, MSNBC (Dec. 8, 2015), http://www.msnbc.com/transcripts/hardball/2015-12-08 (last visited Mar. 20, 2018).

[46] *Donald Trump Speaks Out on Plan to Ban Muslims*, ABCNews (Dec. 8, 2015), http://abcnews.go.com/GMA/

Asked if he was in favor of internment camps, Mr. Trump repeated his reliance upon President Roosevelt's actions during World War II: "He did the same thing."[47]

Two days later, on December 10, 2015, Mr. Trump defended his position by publishing a link to an article stating that Islam is a "very evil and wicked religion," a "false religion," advocating that Muslims should be banned, and making further analogy to the treatment of Japanese during World War II.[48]

On March 9, 2016, Mr. Trump stated, "we can't allow people coming into this country who have this hatred of the United States" and denied that a distinction could be made between "radical Islam" and "Islam itself."[49] Echoing the justification that the government invoked to justify the detention of Japanese Americans in *Korematsu*, he claimed that it was necessary to include all Muslims because "you don't know who is who."[50] *See Korematsu*, 323 U.S. at 218-19 ("temporary exclusion [of all Japanese Americans] was rested

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video/donald-trump-speaks-plan-ban-muslims-35640498 (4:38 to 5:00) (last visited Mar. 20, 2018).

[47] *Id.*

[48] Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/675034063447662592 (last visited Mar. 20, 2018); *see also* Sarah Larimer, *Why Franklin Graham says Donald Trump is right about stopping Muslim immigration*, Wash. Post (Dec. 10, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/why-franklin-graham-says-donald-trump-is-right-about-stopping-muslim-immigration/ (last visited Mar. 20, 2018).

[49] Transcript, Anderson Cooper 360 Degrees (Mar. 9, 2016), http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html (last visited Mar. 20, 2018).

[50] *Id.*; *see also* Schleifer, *supra* note 6.

by the military" on the rationale that "it was impossible to bring about an immediate segregation of the disloyal from the loyal").

Moreover, on June 13, 2016, Mr. Trump previewed that he would attempt to defend his religious ban based on the President's immigration authority. Indeed, just as he ultimately did in his orders and the government does before this Court, Mr. Trump invoked the language of 8 U.S.C. § 1182(f), stating that "laws of the United States give the president powers to suspend entry into the country of any class of persons . . . as he or she deems appropriate."[51]

Two days later, on June 15, 2016, Mr. Trump explained that he would not back down from pursuing his "temporary ban on Muslim integration," again equating being Muslims with being a radical terrorist. He stated, "You are going to have to watch and are going to have to see. I have done a lot of things that nobody thought I could do."[52]

In July 2016, Mr. Trump made explicit that he would continue to pursue a ban on Muslim entry into the U.S. upon being elected, but explained that he would achieve it by speaking in terms of "territories" and "extreme vetting." On July 21, 2016, he stated, "[W]e must immediately suspend immigration from any nation that has been compromised by terrorism until such time it's proven that vetting mechanisms

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[51] *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (June 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats (minutes 5:30 to 6:40) (last visited Mar. 20, 2018).

[52] *Face the Nation transcripts June 5, 2016: Trump*, CBS News (June 5, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/ (last visited Mar. 20, 2018).

have been put in place."[53] Three days later, asked whether this language indicated an intent to "pull back from" the "Muslim ban," Mr. Trump made clear that it was not:

> I don't think so. . . . In fact, you could say it's an expansion, I'm looking now at territories. People were so upset when I used the word "Muslim": "Oh, you can't use the word 'Muslim.'" Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. . . .
>
> Now, we have a religious, you know, everybody wants to be protected. And that's great. . . . I view it differently. . . .
>
> We're making it territorial. We have nations and we'll come out, I'm going to be coming out over the next few weeks with a number of the places.[54]

The President advocated restricting the entry of Muslims to the United States on numerous other occasions:

- On September 18, 2015, when asked about getting "rid of" Muslims, Mr. Trump

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[53] Politico, *Full text: Donald Trump 2016 RNC draft speech transcript* (July 21, 2016), http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974 (last visited Mar. 20, 2018).

[54] Transcript, Meet the Press, NBC News (July 24, 2016), http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706 (last visited Mar. 20, 2018); Jenna Johnson, *Donald Trump is expanding his Muslim ban, not rolling it back*, Wash. Post (July 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/ (last visited Mar. 20, 2018).

responded that he was "going to be looking at that and many other things."[55]

- On October 12, 2015, Mr. Trump tweeted: "Muslims escorted into U.S. through Mexico. Now arriving to Oklahoma and Kansas! Congress?"[56]
- On January 2, 2016, Mr. Trump tweeted: "Hillary Clinton said that it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant!"[57]
- On March 22, 2016, Mr. Trump tweeted that Hillary Clinton was "incompetent" because she would "let the Muslims flow in. No way!"[58]
- On March 24, 2016, following deadly attacks in Brussels, Mr. Trump tweeted that "[i]t is amazing how often I am right" about "Muslims."[59]

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[55] *See* Schleifer, *supra* note 3.

[56] Donald J. Trump, Twitter (Oct. 12, 2015), https://twitter.com/realDonaldTrump/status/653774823483703297 (last visited Mar. 20, 2018).

[57] Donald J. Trump, Twitter (Jan. 2, 2016), https://twitter.com/realDonaldTrump/status/683277309969694720 (last visited Mar. 20, 2018).

[58] Donald J. Trump, Twitter (Mar. 22, 2016), https://twitter.com/realDonaldTrump/status/712473816614772736 (last visited Mar. 20, 2018).

[59] Donald J. Trump, Twitter (Mar. 24, 2016), https://twitter.com/realDonaldTrump/status/713012045214531584 (last visited Mar. 20, 2018).

D. The President Has Reaffirmed His Discriminatory Motive Since Being Elected And On In The Lead Up To This Proclamation.

The government attempts to dismiss the President's concerted attack on Muslim people as mere "campaign statements" and selectively acknowledges just two post-campaign statements. Gov't Br. at 66-68. As set forth below, the President has made numerous statements since being elected to office—and several in the immediate lead up to the present Proclamation—that have harkened back to, and reaffirmed, his discriminatory purpose.

Over a month after being elected, Mr. Trump was asked whether he would reevaluate his intention to ban entry of Muslim people. Referring to his earlier pledge, he responded: "You know my plans all along, and I've been proven to be right."[60] Within a week of taking the oath of office, the President signed his initial executive order. Upon reading its abstruse title, "Protecting the Nation from Foreign Terrorist Entry into the United States," he added, "We all know what that means"—an obvious reference to his well-known pledge to prevent Muslims from entering the country.[61] Indeed, the very same day, President Trump explained on national television that the

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[60] Video, *Trump: 'You've known my plans' on proposed Muslim ban*, Wash. Post (Dec. 21, 2016), https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html (last visited Mar. 20, 2018).

[61] *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173 (last visited Mar. 20, 2018).

exceptions he had set forth in his order were intended to prioritize Christians over Muslims. He stated that he sees Christians as a "priority" and—expressly drawing a comparison between Christian refugees and Muslim refugees—he explained that he was "going to help" Christians.[62]

On February 4, 2017, President Trump referred to his initial executive order the same way he had throughout his campaign—as a "ban."[63] After the government received stays in judicial proceedings across the country while they revised the executive order, the President's senior advisor stated that the new order would be designed to achieve "the same basic policy outcome" as the first order and to address only "very technical issues."[64] The President's Press Secretary similarly stated that "the principles of the executive order remain the same."[65]

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[62] David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017), http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees (last visited Mar. 20, 2018).

[63] Politico, *Trump warns of 'death & destruction' if U.S. not allowed to limit immigration* (Feb. 4, 2017), http://www.politico.com/story/2017/02/trump-travel-ban-judge-james-robart-234643 (last visited Mar. 20, 2018); Donald J. Trump, Twitter (Feb. 4, 2017), https://twitter.com/realDonaldTrump/status/827865957750161408 (last visited Mar. 20, 2018).

[64] Fox News, Transcript, *Miller: New order will be responsive to the judicial ruling* (Feb. 21, 2017), http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis/ (last visited Mar. 20, 2018).

[65] The White House, Press Release, *Press Gaggle by Press Secretary Sean Spicer* (Mar. 6, 2017),

On March 15, 2017, the day that President Trump's second executive order was first enjoined, President Trump himself stated that the order was simply "a watered down version of the first order" and expressed that he would prefer to "go all the way" and do "what [he] wanted to do in the first place."[66] The next day, President Trump reiterated his oft-expressed view during the campaign that "[t]he assimilation [of Muslims in the U.S.] has been very, very hard. It's been a very, very difficult process."[67]

Despite being updated daily, the President's website continued to call for a "total and complete shutdown of Muslims entering the United States" when he issued his initial executive order, when he issued his revised executive order, and for long after. Notwithstanding repeated notification,[68] the President continued to call for a total and complete ban on Muslims from the U.S. until May 8, 2017, when the

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https://www.whitehouse.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer (last visited Mar. 20, 2018).

[66] Andrew Prokop, *With Trump's new travel order blocked and his health bill flailing, his agenda's in tatters*, Vox (Mar. 16, 2017), http://www.vox.com/policy-and-politics/2017/3/16/14935784/trump-achievements-accomplishments (last visited Mar. 20, 2018).

[67] Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, Wash. Post (Mar. 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/16/donald-trump-explained-twitter-the-universe-and-everything-to-tucker-carlson/ (last visited Mar. 20, 2018).

[68] *See, e.g.*, Complaint at 7, *Hawai'i v. Trump*, 1:17-cv-00050 (D. Haw. Feb. 3, 2017); Amended Complaint at 8, *Hawai'i v. Trump*, 1:17-cv-00050 (D. Haw. Mar. 7, 2017).

Acting Solicitor General was questioned about it by the Fourth Circuit.[69]

In these proceedings, the Department of Justice has repeatedly represented that the President's orders and Proclamation bear no connection to the "Travel Ban" or "Muslim Ban" for which the President long advocated, attempting to sanitize the orders as reflecting "national-security and foreign-policy judgments informed by the worldwide review of multiple agency heads." Gov't Br. at 16.[70] However, the President's own statements between the time of his initial orders and the present Proclamation demonstrate that he views them as effectuating his long-promised "Travel Ban." In particular, the President has made the following statements:

- On February 16, 2017, the President stated, "Let me tell you about the travel ban. We

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[69] Cristian Farias, *Trump's 'Muslim Ban' Pledge Scrubbed From Website Just As Judges Ask About It*, Huffington Post (May 9, 2017), http://www.huffingtonpost.com/entry/trump-muslim-ban-pledge website_us_591204dfe4b050bdca5ff6c1 (last visited Mar. 20, 2018); Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (Internet Archive record on May 8, 2017) (last visited Mar. 20, 2018).

[70] The President's Press Secretary made similar representations that "it's not a travel ban." Peter W. Stevenson, *Trump says it's a travel 'ban.' His staff insisted it wasn't*, Wash. Post (June 5, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/05/trump-says-its-a-travel-ban-his-staff-insisted-it-wasnt/ (last visited Mar. 20, 2018).

had a very smooth rollout of the travel ban."[71]

- On April 26, 2017, the President stated, "the Ninth Circuit rules against the ban . . . ridiculous."[72]
- On June 3, 2017, the President stated, "We need the Travel Ban as an extra level of safety!"[73]
- Two days later, the President stated, "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[74]
- The same day, he stated, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."[75] He further stated, "we need a TRAVEL

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[71] Full Transcript and Video: Trump News Conference, New York Times (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html (last visited Mar. 20, 2018).

[72] Donald J. Trump, Twitter (April 26, 2017), https://twitter.com/realDonaldTrump/status/857177434210304001 (last visited Mar. 20, 2018).

[73] Donald J. Trump, Twitter (June 3, 2017), https://twitter.com/realDonaldTrump/status/871143765473406976 (last visited Mar. 20, 2018).

[74] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871674214356484096 (last visited Mar. 20, 2018).

[75] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128 (last visited Mar. 20, 2018).

BAN . . . not some politically correct term that won't help us protect our people."[76]

- One week later, on June 13, 2017, he wrote: "the 9th Circuit did it again - Ruled against the TRAVEL BAN."[77]
- On September 15, 2017, the President again derided the political correctness of the travel ban: "The travel ban into the United States should be far larger, tougher and more specific-but stupidly, that would not be politically correct!"[78]

The President's repeated derisions of the Department of Justice for making the language in his orders "politically correct"—statements made in the immediate lead up to the present Proclamation—are damning because the only plausible interpretation of those criticisms is that the President views the territories listed as a proxy for religion.

The Administration has since expressly betrayed the Proclamation's religious purpose. On November 29, 2017, the Principal Deputy Press Secretary was asked whether "the President think[s] that Muslims are a threat to the United States."[79] He explained that

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[76] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871899511525961728 (last visited Mar. 20, 2018).

[77] Donald J. Trump, Twitter (June 13, 2017), https://twitter.com/realDonaldTrump/status/874578159676665857 (last visited Mar. 20, 2018).

[78] Donald J. Trump, Twitter (Sept. 15, 2017), https://twitter.com/realDonaldTrump/status/908645126146265090 (last visited Mar. 20, 2018).

[79] The White House, *Press Gaggle by Principal Deputy Press Secretary Raj Shah en route St. Louis, MO* (Nov. 29, 2017)

"the President has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."[80]

In addition to the numerous instances above expressly reaffirming the Proclamation's religious purpose (virtually all of which the government ignores), the President has continued disseminating propaganda since taking office. On August 17, 2017, for instance, the President promoted the same anti-Muslim propaganda that General Pershing was able to eradicate terrorism by murdering captured Muslims with bullets soaked in pigs' blood. *See supra* Section I.A.2. The President advocated: "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"[81]

Thereafter, on November 29, 2017 (the same day that the Administration stated that the Proclamation "addressed" the threat of Muslims to the United States), the President promoted three unverified videos published by a British anti-Muslim group depicting violent acts by purportedly Muslim people—at least one of whom it turns out, is not Muslim—with titles intended to provoke anti-Muslim bias. The videos were entitled "Muslim migrant beats up Dutch

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(emphasis added), https://www.whitehouse.gov/briefings-statements/press-gaggle-principal-deputy-press-secretary-raj-shah-112917/ (last visited Dec. 4, 2017) (last visited Mar. 20, 2018).

[80] *Id.*

[81] Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088 (last visited Mar. 20, 2018).

boy on crutches!,"[82] "Muslim Destroys a Statue of Virgin Mary!,"[83] and "Islamist mob pushes teenage boy off roof and beats him to death!"[84]

II. The Government Would Have This Court Repeat Its Most Shameful Moments.

It is hard to imagine a clearer "affirmative showing" that the President's Proclamation effectuates his longstanding pledge to restrict the entry of Muslim people—a pledge that he has not only never disavowed, but that he has consistently reaffirmed. Indeed, the government's own amici openly admit the Proclamation's religious basis, justifying it as a "recognition of the nexus between Islamic scripture and terrorism committed by Muslims." Amicus Br. of Andrew McCarthy, *et al.* at 10; *see also id.* at 12 ("[H]ow do you ever achieve this goal if . . . you are forced to disavow a purpose to subject alien Muslims to heightened scrutiny?").

Discrimination against a particular religion on the basis of overt animus is the most obvious and fundamental abuse of government authority that the Establishment and Equal Protection Clauses exist to protect. *E.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."). This Court has the

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[82] Peter Baker & Eileen Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them* Nov. 29, 2017), https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html (last visited Mar. 24, 2018).

[83] *Id.*

[84] *Id.*

obligation to protect discrete and insular minority communities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and to prevent the exercise of Executive power to "harm a politically unpopular group," *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted).

This Court has recognized its duty to enforce the Constitution does not dissipate as soon as the Executive utters the words "national security." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (the President does not "have the power to switch the Constitution on or off at will" by invoking national security); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("Our precedents . . . make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role."). Indeed, the importance of judicial intervention is at its highest in these circumstances. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part and dissenting in part) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.").

The government's argument before this Court is not novel. It is the same line it advanced 70 years ago to justify the internment of Japanese Americans in *Korematsu*, now viewed as one of the most shameful decisions in American history. *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1259 (2004) (Complete "judicial acquiescence or abdication" in the face of executive discretion "has a name. That name is Korematsu."); Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379,

380 (2011) (*Korematsu* "embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute"). MJC urges the Court not to overlook the extensive record documented herein, and to avoid repeating the terrible mistake made in generations past.

CONCLUSION

For the foregoing reasons, MJC respectfully urges the Court to affirm.

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